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The Royal Pardon and Criminal Procedure in Early Modern England

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Résumé de l'article

Lorsqu'on se penche sur la prérogative royale du pardon aux condamnés, cette étude jette une lumière particulière sur plusieurs aspects du système judiciaire criminel anglais, particulièrement au XVIII^e siècle. Cette prérogative faisait souvent contrepois au système du jury nouvellement instauré, notamment après 1689, alors que l'augmentation notable des peines capitales menaçait d'entraîner des exécutions en plus grand nombre. D'après le témoignage que nous livrent les pétitions pour grâce du XVIII^e siècle, l'autorité royale jouissait d'un large champ d'action. Étaient mis en balance l'intérêt public et la nature du crime, l'opinion du juge et celle des hommes influents qui défendaient le condamné. Le pardon allait donc dans le sens de l'appareil judiciaire, qu'il contribuait à raffiner en lui permettant d'interpréter et d'appliquer la loi criminelle de façon à mettre en relief l'effet de terreur tout en faisant ressortir le sens de la justice et l'humanité du roi. La prérogative royale permettait de faire fonctionner au mieux le système judiciaire et d'obtenir l'effet désiré. À la fin du XVIII^e siècle et au début du XIX^e, on passa minutieusement au crible les condamnations et les attitudes qui avaient donné sa force au système judiciaire criminel. La cruauté et l'arbitraire des peines capitales firent l'objet de critiques particulières. Au début du XIX^e siècle, tout le système social fut remis en question, et la prérogative royale du pardon fut parmi les mesures abrogées par la réforme politique et sociale.

The Royal Pardon and Criminal Procedure in Early Modern England

J.M. BEATTIE

Résumé

The study of the royal power of pardon illuminates the English criminal justice system, particularly in the eighteenth century. Pardons granted on condition of transportation acted as a counterbalance to the harshness of the "Bloody Code", notably after 1689 when a considerable increase in the number of capital statutes threatened a vast rise in executions. The documents generated by the pardon process, especially petitions and judges' reports, suggest the boundaries within which the royal authority was exercised and the relative weight given to the nature of the offence, the character of the accused and the influence of the social and political elite. A study of those who were pardoned and those on the other hand who were hanged reveals that the overriding aim of those who administered the criminal law was to interpret and enforce the law so as to enhance its terror while underlining the king's justice and humanity. The royal power of pardon was an essential element in that administration of the law. During the late-eighteenth and early-nineteenth centuries, the convictions and attitudes which supported the criminal justice system came under scrutiny, and the cruelty and capriciousness of capital punishment was the subject of particular criticism. The reform of the law in the early decades of the nineteenth century sharply curtailed the role that the royal pardon had played in the administration of justice for several centuries.



Lorsqu'on se penche sur la prérogative royale du pardon aux condamnés, cette étude jette une lumière particulière sur plusieurs aspects du système judiciaire criminel anglais, particulièrement au XVIII^e siècle. Cette prérogative faisait souvent contrepoids au système du jury nouvellement instauré, notamment après 1689, alors que l'augmentation notable des peines capitales menaçait d'entraîner des exécutions en plus grand nombre. D'après le témoignage que nous livrent les pétitions pour grâce du XVIII^e siècle, l'autorité royale jouissait d'un large champ d'action. Étaient mis en balance l'intérêt public et la nature du crime, l'opinion du juge et celle des hommes influents qui défendaient le condamné. Le pardon allait donc dans le sens de l'appareil judiciaire,

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qu'il contribuait à raffiner en lui permettant d'interpréter et d'appliquer la loi criminelle de façon à mettre en relief l'effet de terreur tout en faisant ressortir le sens de la justice et l'humanité du roi. La prérogative royale permettait de faire fonctionner au mieux le système judiciaire et d'obtenir l'effet désiré. À la fin du XVIII^e siècle et au début du XIX^e, on passa minutieusement au crible les condamnations et les attitudes qui avaient donné sa force au système judiciaire criminel. La cruauté et l'arbitraire des peines capitales firent l'objet de critiques particulières. Au début du XIX^e siècle, tout le système social fut remis en question, et la prérogative royale du pardon fut parmi les mesures abrogées par la réforme politique et sociale.

The power to pardon accused or convicted offenders and to save them from the consequences of their alleged actions was inherent in the prerogative of English kings and was exercised from a very early period. After the Conquest, when the Angevin kings established their control over the administration of the criminal law, the royal pardon was of fundamental importance in shaping the development of the law over several centuries, and particularly the law of homicide. The royal power to pardon convicted felons was central to the process by which forms of excusable or justifiable homicide came to be defined and separated from "murder" — that is from deliberate killing with malice aforethought — and it remained an important aspect of the means by which criminal liability was determined well into the early modern period. In the eighteenth century — the period I will be dealing with mainly in this essay — the royal pardon remained indispensable in the administration of the criminal law.¹

Criminal procedure had also been significantly shaped over the medieval and early modern periods by another institution whose role and powers influenced the development and the scope of the law — the criminal trial jury. From the thirteenth century, the jury increasingly determined not simply the fact of an accused's involvement in a homicide, but the nature of the offence in law — whether it was murder, or some form of excusable homicide (an accident, let us say), or a justifiable killing (as in self-defence), or a homicide in which the offender was at least partially to blame (manslaughter, as it came to be called by the sixteenth century). This shaping of the law was the result very largely of the jury's having a large discretionary capacity, and the power in particular to find not just a general verdict of guilty or not guilty, but the ability in effect to reduce the charge faced by a prisoner by means of the verdict — by finding the prisoner not guilty of one offence but guilty of another, not guilty for example of murder but guilty of manslaughter.²

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1. For pardoning procedure and policy in the medieval period see Naomi D. Hurnard, *The King's Pardon for Homicide before A.D. 1307* (Oxford, 1969).
 2. Thomas A. Green, *Verdict According to Conscience: Perspectives on the English Criminal Trial Jury, 1200-1800* (Chicago and London, 1985), ch. 2-3; J.S. Cockburn, *Calendar of Assize Records, Home Circuit Indictments, Elizabeth I and James I, Introduction* (London, 1985), ch.5.

THE ROYAL PARDON AND CRIMINAL PROCEDURE

For some centuries a royal pardon was still required for those the juries excused, but such pardons were more formulaic than not, and the need to obtain the royal favour fell away as the law of homicide was more clearly defined and settled. By the late seventeenth century — and perhaps in practice much earlier — a pardon in such cases was no longer required.

But the royal pardon had another role in England. The king had the power to extend mercy to those who had been convicted — to pardon by grace and favour — and to relieve them of the penalties that attached to their offences. That form of pardon continued in the early modern period to play an important and indeed an increasingly important part in the administration of the English criminal law. The discretion that that power gave to the king enabled him to determine whether convicted offenders would be punished, and the punishments that would be imposed. It was in that form that the royal pardon came to play a central, indeed a crucial, role in the administration of the law. It was used not simply to correct an occasional miscarriage of justice or to respond to new information when a trial was concluded — as clemency might be in the modern world — but as an ordinary and established aspect of the way the law was administered. The royal pardon was employed regularly to alter and to shape the way convicted offenders were punished in the eighteenth century. The documents that that process created enable us to uncover some of the springs of penal and criminal policy in ways that the ordinary judicial records do not; they allow us to hear the judges and royal officials thinking out loud and to eavesdrop on the condemned prisoners and their supporters asking for mercy.

That is my subject: the way in which the royal power of pardon was used in the eighteenth century, the intentions behind it, the meanings that attach to it, and the more general conclusions about the place of the criminal law in the maintenance of the larger social order that can be drawn from it. To ask who was pardoned and saved from the gallows and on what grounds is to ask who was *not* pardoned, but hanged, and on what grounds. Something will be said about the forms of the documents that were produced by the pardoning procedures: but the nature and implications of the pardoning power itself has to be dealt with first.

i

Royal pardons were particularly common and absolutely essential to the administration of the criminal law in the eighteenth century because of the merging then of two long-term processes. One was the enlargement over the early modern period in the scope of the death penalty.

Beginning in the sixteenth century and strongly renewed after 1689, the capital provisions of the English criminal law were strengthened and extended, very largely by Parliament. In statute after statute restrictions that had kept a very large number of offences effectively noncapital — particularly the device of benefit of clergy — were removed, and the law was changed in ways that required the courts to pass sentence of death on larger and larger numbers of offenders. By the early eighteenth century,

two waves of statutory enactments had very considerably extended the effective range of capital punishment. Not only were the serious violent offences like murder, rape and infanticide punishable by execution; property offences that threatened violence like robbery and burglary were also capital, as were a wide range of much more trivial property crimes including shoplifting and servants' pilfering.³

By then, too, another and contradictory impulse — much less clear but no less real — seems to have been operating for close to a hundred years: that is, an apparent reluctance in the courts and the government to hang large numbers of offenders. After very high levels of capital punishment in the early seventeenth century — a result no doubt of economic and social dislocation as well as the changes in the criminal law that had taken place under the Tudors — executions fell gradually to lower and relatively stable levels. There were to be some very sharp short-term fluctuations over the next century and a half, but generally speaking one can say that executions in England were to hold at these levels into the decades of fundamental reform in the early nineteenth century.⁴

It is not possible to follow that in detail here or fully investigate possible explanations — though it appears that at base was the sense in those who controlled these matters that public approval and support of the king's justice required a prudent use of capital punishment, and that in particular public acceptance of the legitimacy of the law might be threatened if large numbers of offenders were regularly executed together. There was clearly a persuasion in the late seventeenth and eighteenth centuries that capital punishment worked most effectively by terror and example — an understanding, a shared belief, in the governing class, among those who made these decisions, that the law would be most effectively enforced not by rivers of blood, but by the controlled use of capital punishment, striking fear in the hearts of those who might break the law by the horrible example of some men (and a few women) executed in public.⁵

Two impulses were thus working to some extent at cross-purposes after 1689: the scope of capital punishment was broadened, and the number of men and women in danger of being hanged was increased, but executions were kept at roughly the same level, with some sharp fluctuations over the short term. Each of these impulses can

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3. On the extension of the death penalty see Leon Radzinowicz, *A History of the English Criminal Law and its Administration from 1750* (London, 1948), vol. 1, ch. 1; Douglas Hay, "Property Authority and the Criminal Law," in *Albion's Fatal Tree: Crime and Society in Eighteenth-Century England*, eds. Douglas Hay, Peter Linebaugh and E.P. Thompson (London, 1975), 17–21; J.M. Beattie, *Crime and the Courts in England, 1660–1800* (Princeton, 1986), 143–46.
 4. On the changing levels of execution over the early-modern period see Radzinowicz, *History*, vol. 1, ch. 5; J.A. Sharpe, *Crime in Early Modern England* (London, 1984), 63–70; Philip Jenkins, "From Gallows to Prison: The Execution Rate in Early Modern England," *Criminal Justice History* 7 (1986): 51–72; Douglas Hay, "Capital Punishment in England, 1750–1832." (Paper read at the American Society for Legal History Conference, 1986); to be elaborated in his *Law and Justice in Hanoverian England* (forthcoming).
 5. Hay, "Property, Authority and the Criminal Law," 49–50.

be explained on its own terms and the apparent paradox of the law becoming tougher but the level of hanging not going up appreciably is not in fact quite as striking as it might seem at first sight.

What is of interest here is the way the level of executions was controlled, and the way people were chosen to be hanged or to be saved. Two mechanisms were at work; two forms of discretionary power together shaped the way the law was enforced. One was the jury, for the trial jury's discretionary power to reduce the level of the charge could be used to save accused offenders from the worst consequences of their crimes. Such "partial" verdicts saved large numbers from the threat of death.⁶ But many accused were in fact convicted of the wide range of offences that could bring the death penalty, and the second device that saved large numbers from the gallows came into play at that point to manage directly the level of capital punishment and to control the messages being broadcast from the courts and hanging places. That was the royal pardon.

ii

Pardons were obtained in two ways, or at two points along the administrative chain between arrest and punishment. At the end of virtually every session of the main criminal courts — the assizes in the counties and the Old Bailey in London — a group of men and women stood before the judge having been convicted of capital offences, and the judge had to decide in effect how many and who among them should in fact be selected to be hanged and who saved. For the judge had the power of reprieve, the power that is to stay execution and allow time for the king to pardon the condemned offender, if he chose, and to substitute another punishment — transportation to America being by the 1720s the most common alternative. Such reprieves were in effect pardons, for the king virtually never refused to spare someone nominated by the judge who had presided at the trial. Indeed pardons following the judges' reprieves had become so automatic by the third decade of the eighteenth century that the judges were told they need not even justify their decisions; they simply sent in the names of those they thought deserving and they would be granted the king's mercy.⁷ It seems clear that one reason why pardons became more easily available in this way was the establishment in the early eighteenth century of the punishment of transportation to the American colonies, for that provided an alternative to the death penalty.⁸ A convicted offender spared from the gallows could now — and essentially for the first time — be punished severely and not simply released into the community. At any event, a very large proportion of those who stood before the judge at the conclusion of the session were subjected to the terrifying words of the death penalty and then were saved by him — and ultimately

6. Green, *Verdict According to Conscience*, 279–81; Beattie, *Crime and the Courts in England*, 419–30.

7. Public Record Office, State Papers, Domestic, SP 36/9/149.

8. On the development of transportation see Abbot E. Smith, *Colonists in Bondage: White Servitude and Convict Labour in America, 1607–1776* (1947; rep. Gloucester, Mass., 1965), 89–135; Roger Ekirch, *Bound for America: The Transportation of British Convicts to the Colonies, 1718–1775* (New York, 1987); Beattie, *Crime and the Courts in England*, ch. 9.

by the mercy of the king — and not sent for execution. Those who remained were left, as judges commonly said, “for hanging.” For the most part, however, their execution would not follow for several weeks, and such men and women were able to petition the king on their own behalf or to get their friends to do so. It is in the documents produced by this petitioning process that one gets some insight into the intentions of the criminal justice system and the management of death, into the reasons not only why some of these condemned men and women were ultimately spared, but also why juries and judges had earlier saved some offenders in the courtroom and not others — direct information on those earlier courtroom decisions being largely beyond recovery in the English system of oral trial and testimony.

The documents that survive from this eighteenth century process are of several kinds. First of all, there were petitions and letters from the condemned and those who spoke for them, addressed to the king and pleading for mercy. Generally speaking, such petitions were routed by way of the secretary of state to the judge who had presided at the trial for his report on the prisoner and the offence — what evidence had been presented and by whom, and so on — and for his recommendation to the king. Such petitions were also frequently supported, and occasionally opposed, by letters from a wide range of people, including important members of the social and political elite, the victims who had prosecuted the case, and the prisoners’ neighbours and fellow parishioners. Finally, there are the reports and recommendations of the judges who had originally tried the case. There are thousands of such documents in the Public Record Office, in the series known as the State Papers Domestic, or Home Office Papers after 1782. What I want to ask briefly is what can one learn from them about the intentions and the functions of the criminal justice system in the eighteenth century, about the forces acting on the judges and the king when pardons were being contemplated, and thus about the grounds upon which the death penalty was applied?⁹

iii

Let me begin with the petition of James Munro, who had been condemned to death in Cambridge for a highway robbery in 1717. His petition so clearly follows what was obviously recognized as the proper form for petitions to the king — it was carefully and rather elegantly set out on one page and contains a number of obligatory phrases — that the first thing one must note about the pardon procedure from the petitioner’s point of view was that he or she needed to get professional help, doubtless the help of an attorney who could put the plea into proper form and whose clerk could write an acceptable hand. Who these attorneys were, how they were employed, how much the service cost — not an unimportant question in the case of most of the prisoners who required the help — remains entirely unknown. To judge from the piles of petitions

9. Examination of the eighteenth-century pardon process based on petitions and judges’ reports has been undertaken in a number of works. See, for example, Radzinowicz, *History*, vol. 1, ch. 4; Hay, “Property, Authority and the Criminal Law,” 40–49; Peter King, “Decision-Makers and Decision-Making in the English Criminal Law, 1750–1800,” *Historical Journal* 27 (1984): 419–30.

that found their way to the secretary of state and the king, such help was widely available. Those who provided it knew not only the form, but also the considerations that would be most likely to move the royal mercy. They knew what story to tell.

James Munro's petition did not dispute that he had committed the highway robbery in Cambridge for which he had been sentenced to death. The burden of his plea was that this was "the first crime of that nature he ever committed, being led into it and decoyed by the artifice and persuasion of another who is now under condemnation for the same crime, he having first rendered your humble petitioner stupid and senseless by the force of drink" He added that he had also strayed into such bad company "by reason of his youth and want of experience in the world" (he was about 21) and that "in all the former part of his life he has behaved himself with that honesty in his dealings as will he hopes give good grounds for his future amendment" — if, of course, he was pardoned.¹⁰ Munro, or his adviser and scribe, is touching here on some of the enduring themes of the pardon plea: the offender facing death is young and inexperienced, was drawn in by another, was fuddled by drink, had been brought up honestly in a respectable family, had been hitherto hardworking, and would be so again.

Sarah Nash, petitioning on behalf of her brother who was similarly condemned for robbery in London, touched on another common theme in such petitions: it was, she claimed, his first offence and had been "not so flagrant as theirs who have continued in a longer course of wickedness." Her brother, she claimed, had not used excessive violence and cruelty, had not beaten or frightened his victim, and particularly had not threatened him with a weapon.¹¹

Pardon petitions concentrated in this way on the character of the condemned man or woman and on those aspects of the offence and its surrounding circumstances that put that character and disposition in a good light. A man or woman facing death in a matter of weeks would not be inclined, however, to depend entirely on a politely worded petition if they could move other levers at the same time. As well as getting an attorney to plead for his life in the petition sent to the king via the secretary of state, James Munro also wrote to his mother at the same time and asked her to do what she could. Not many such private letters from prisoners found their way into the State Papers, but it is surely likely that the intentions and hopes of the note he scrawled on a fragment of paper, innocent of punctuation, were commonly expressed by the men and women held in the condemned cells.

Honred mother [he wrote] this is to let you know that I am condemned and I beg that you and my sisters wold trouble youre selves to get Mr Strauan and to brigader Bisset and beg of them to get my reprieve for me and for gods sake do not lose no time when these lines come to your hands This all from your loving son James Munro For god sake do not lose one minute . . . for I have not got one week to live.¹²

10. SP 35/6/21.

11. SP 36/47/261.

12. SP 35/6/63.

It is not known whether this appeal resulted in effective support coming to Munro's aid or whether he was in fact executed — as is so often the case, given the deficiencies of the 18th century records. What is clear is that such appeals to the Strauans and the Bissets of the world were very common indeed. We may presume they were men of influence in Munro's parish; perhaps one of them was the local clergyman, or perhaps they were landowners, or large employers. Such men were often drawn into the petitioning process, and to good effect. The English records are full of testimonials offered in formal petitions or by endorsements on the prisoners' own petitions by men who commonly described themselves as the "principal" or the "respectable" inhabitants of the parish or the town from which the prisoner came. Such petitions were obviously most effective when they were endorsed by the local vicar, the churchwardens, constables, and other officials, and by as many of the leading members of the community as could be induced to sign. Many of those that arrived in the secretary's office had been endorsed by a dozen or two of the local notables and occasionally as many as fifty or even a hundred. A letter from "The Minister, Churchwardens, and Principal Inhabitants of Poplar," a parish to the east of the city of London, for example, recommended Abraham Hancock to the king's mercy. Hancock was in Newgate prison under sentence of death for robbery. They had made, they said,

diligent Enquiry in their Neighbourhood where the Convict lived all his life and verily believe That this is the first Fact of this or the like kind of which he has been guilty. That he is a young man of about 21 years, That his general character stands clear among them, that he is not engaged in any Gang or Society of Robbers. And that this Fact was the Effect of Liquor, and proceeded not from any Habit of Theft.¹³

There are hundreds of such brief testimonials in the papers of the secretaries of state, carrying similar messages. They might add that the prisoner had been brought up honestly by respectable parents, that he had had some education, or that they believed he or she had acted from necessity induced by extreme poverty, that the prisoner has shown great remorse since committing the offence, and that, in the words of two dozen petitioners from Abingdon, "if mercy was extended towards him, he would lead a good Sober and Religious Life for the Future."¹⁴

For the most part such statements were endorsed by men of middling rank. They obviously counted for a great deal. Even more valuable was the support of someone of social or political eminence, a peer, a landed gentleman of considerable substance, an MP. At the very least their support guaranteed that the petition would be read and taken seriously. When the Earl of Aylesford wrote to the secretary of state in 1730 to ask him "as a favour" to ensure that the son of a tenant of his in Kent who was under sentence of death for housebreaking would be pardoned, it is a reasonable assumption that the king and his ministers paid his letter some attention.¹⁵ The correspondence of the secretaries is peppered with such requests and endorsements

13. SP 36/53/164.

14. SP 36/59/74.

15. SP 36/20/28.

from the socially prominent and politically important. This simply reminds us of the point made a decade ago by Douglas Hay that the granting of pardons was a political as well as a judicial act.¹⁶ It was political in the broad sense that the exercise of mercy provided the king with an opportunity to demonstrate his paternal and loving regard for his people and thereby to strengthen their loyalty to him and the dynasty.¹⁷ More narrowly it provided opportunities for the king's ministers to display to a political class that was finely attuned to such signals that they had the favour of the crown, and opportunities in addition for their dependents and supporters and the elite in general to demonstrate their access to the favour and patronage of those who counted and thus to strengthen the ties of friendship and deference that supported their local eminence or their political ambition. The secretary of state was not simply a bureaucrat who happened to be in charge of the pardon procedure; he was also a leading member of the king's administration. Some of the appeals to him were narrowly and frankly political. An MP wrote to the Duke of Newcastle in 1730 when he was secretary, for example, urging him to press for the pardon of one of his constituents who was about to be hanged at Tyburn. He had been encouraged to do so, he said, by many respectable men in the town he represented, though he also felt some personal obligation since the man had voted for him.¹⁸ In another such case, a group of five voters in the county of Sussex wrote to Newcastle's brother, Henry Pelham — the member of Parliament for the county — to get a kinsman pardoned, offering in return that he would henceforward be able to count on their "voices . . . interest . . . and influence."¹⁹

Elite intervention was clearly immensely beneficial, especially in marginal cases. Despite the obvious political coloring of the pardon process and the room for influence, however, my sense is that decisions were not often *fundamentally* determined by such interventions.²⁰ At the least one can say that such influences were controlled and held in check by another essential stage of the pardon procedure beyond the petitions of

16. Hay, "Property, Authority and the Criminal Law," 45–47.

17. Consideration of public regard for the king was important in John Comyns' recommendation of mercy for Anne Milborne, convicted before him in 1728 under the harsh seventeenth-century infanticide statute. "I think it my duty," he informed the secretary of state, "not only to raise in the minds of the people a reverence and veneration towards his Majesty and Administration on account of his Justice but to engage their love and affection towards him on account of his Goodness and Mercy in cases of hardship and compassion." (SP 36/9/13).

18. SP 36/18/127.

19. SP 35/57/181. When recommending John Bugden to mercy William Townshend forwarded to the secretary of state a certificate from "several of the most Considerable Gentlemen of Yarmouth" attesting to Bugden's good character. "The Gentlemen who sent me these Papers," Townshend notes, "have been so much the friends of Sir Robert Walpole and his family at several Elections at Yarmouth, that I am persuaded Mr Edward Walpole, if he had been in England, would have heartily joined with them in recommending the Petitioner to your Grace's favour . . ." (SP 36/44/148–9).

20. For further evidence and elaboration on this point see King, "Decision-Makers and Decision-Making," 49–51.

the prisoners and their supporters: this was the reference of the pardon request to the trial judge for his report and recommendation. All requests were so referred and nothing was done until they were received.²¹

For their part, the judges must occasionally have been put in an awkward position by this reference. They had already considered this prisoner for a reprieve and pardon, when he or she stood in the court along with the rest of the convicted offenders at the end of the court session and the judge had chosen some of them to be hanged and others to be saved. He had earlier found them wanting. In reconsidering the case, the judge would almost certainly have to be careful not to box the king in, not to make it impossible for him to respond favourably to a powerfully supported petition if he chose to do so. Judges, however, were not invariably circumspect, and many of the thousands of judges' reports in the State Papers remain very negative about the prisoner, even while conceding that other evidence might possibly justify the royal mercy. At any event, it is clear that their reports were taken seriously.

What the judges reported very largely were the views they had formed at the trial, views influenced by the prisoner's witnesses and also no doubt more directly by his appearance and demeanour in the courtroom. But the judge would have heard more than a hundred cases during a typical assize circuit and his impression of most prisoners must have faded in the weeks between the trial and the king's request for a report. In anticipation of just such a request, therefore, judges kept notes on the trials they heard, especially the capital trials.²² Their reports also occasionally referred to the opinions of grand jurors, local magistrates or other men of importance in the community, and there was obviously room here for the further play of influence. Nevertheless the trial had been their main source of information, just as it had provided most of the

21. The Earl of Shelburne, when secretary of state, told a petitioner on behalf of two convicted offenders in 1767 that

the cases . . . have been referred to the Judge, on whose recommendations His Majesty has extended his mercy to the former, on condition of transportation for life. But the circumstances of William Pearse's case are so abundantly worse as reported by the Judge, that his Majesty does not think himself at liberty to extend the same mercy to him. Since his Lordship has been in office, it has been His Majesty's invariable rule to pay the greatest regard to the opinion of the Judges, not having, to his Lordship's knowledge, differed in any one case from it. The reason and justice of it must be clear, since, on the one hand, it is highly reasonable that country convicts should have the same chance as those of the capital, whose cases are always reported by the Recorder. On the other hand, after trial, sentence, and reconsideration by the Judge, it is highly expedient that justice should take place, for the good of the community, on whichever side it appears.

Joseph Redington, ed. *Calendar of Home Office Papers of the Reign of George III*, 2: 187-88.

22. John H. Langbein, "Shaping the Eighteenth-Century Trial: A View from the Ryder Sources," *University of Chicago Law Review* 50 (1983): 5-10, 18-21; Beattie, *Crime and the Courts in England*, 432.

trial had been their main source of information, just as it had provided most of the evidence upon which their original decision to leave condemned offenders for execution had depended. Their trial notes were now crucial if they were to respond effectively to the king's request. This explains the extraordinary fact that judges in the eighteenth century strongly discouraged accused felons from pleading guilty. This was not out of tenderness of feeling or the sense that someone facing the gallows should be encouraged to tell his story. Mainly it was the judges' need to gather information for the pardon decision, for the decision he would have to make immediately in court or the report he might later have to write to the king.²³

What emerges from these reports seems to me to provide the clearest evidence of the grounds on which the death penalty was imposed in the eighteenth century and of the broader intentions behind the criminal law and the way it was administered. The judges generally concentrated on the two issues raised in prisoners' petitions. First, the offence: was it particularly damaging to the community at large, or their view of the community interest — as in some circumstances a riotous offence might be or a significant forgery; or was it accompanied by violence, carried out with vicious and threatening behaviour? Murder was rarely pardoned. In highway or street robbery — the offence for which most offenders were condemned to death in the eighteenth century and on which the judges were frequently asked to report — the crucial question concerned the offenders' demeanour during the robbery. Had they pointed a gun and threatened to use it? Had they used aggressive and insulting language? On the other hand, had they been careful not to injure or to threaten the victim, had they taken money without increasing their victim's fear unduly? Thus William Galway was a likely candidate for a pardon when the judge reported that, though he had stopped the Worcester stage coach and had pointed a pistol and demanded money, he contented himself with taking from only one of the passengers, that "he gave no abusive language nor offered any violence," that his hand shook as he held the pistol, and that he was in the end taken quietly without any struggle at all.²⁴ So too was John Hurt, who had robbed a woman at gunpoint but was reported by the judge to have contented himself with four shillings "tho' she had more money about her" and afterwards "followed her and took her Civilly by the hand, and begged of her not to mention it to any one, and then walked off."²⁵

23. Regarding the petition of John Scott for mercy, Justice Probyn wrote to the secretary of state in 1737 that he could not "Report anything of the Circumstances of the fact with Certainty because no Evidence was Given of it." Scott had waived his right to a trial even though Probyn had warned him at the time that "by pleading Guilty he confessed to the whole Charge of the Indictment in the full Extent that the fact was charg'd against him" (SP 36/42/101-2). See also John H. Langbein, "The Criminal Trial before the Lawyers," *University of Chicago Law Review* 45 (1978): 278; Beattie, *Crime and the Courts in England*, 446-47.

24. SP 36/45/169.

25. SP 36/45/154.

On the other hand, despite the fact that his petition got some local support, Joseph Dale was most likely doomed by the judge's report that he had overtaken the Oxford stage coach near Maidenhead and, with a pistol in his right hand, had

demanded the Coachman to stop and sayd Damn Your Blood stop and sayd to the Passengers Damn You turn out, Damn you all I will have Your Money. That thereupon a Lady in the Coach Swoned Upon which Jersey one of the persons robbed desired Dale to use her civilly. To which Dale replied the Lady is a Bitch and cock't his pistol and Sayd Damn You I will blow Your Brains out.²⁶

Even the testimony of the local community or of a man of social eminence or political clout was not likely to help such an offender who gave the judge no reason to think him, in the coded language of the bench, "a proper object of mercy."

The nature of the offence was thus of importance in judges' decisions, as was the strength of the evidence that convicted the offender. The concerns that are returned to over and over again, however, are the character and the disposition of the offender.²⁷ The evidence that determined the attitudes of the judges in the trial and in the posttrial procedure centered on their impression of the defendant in court and on the defendant's previous record and behaviour: did he seem to be an "old offender"; did he seem to be, in particular, so morally corrupted that he would be incapable of genuine remorse and thus of emendment. A man might safely be pardoned — especially on condition of transportation to America — if he seemed to be genuinely sorry, or was very young and his offence had been the result of an aberration — a sudden temptation, drink, bad companions, even the desperation of poverty — but not otherwise, unless there was especially powerful testimony in his support. Such considerations remind us again that prisoners and their advisers knew what story to tell in their pardon petitions.

iv

The pardon process thus forwarded and refined the general intention of judicial administration to interpret and to enforce the criminal law in such a way as to enhance its terror while underlining the king's justice and humanity. Execution on the gallows and other forms of public punishment were meant to send a sharp message to the labouring poor about the virtues of hard work and obedience, and about the dangers of falling into the habits of life that inevitably brought men to a sad and terrifying end. The gallows, of course, got rid of some very dangerous men whose death would remove one source of future crime. The scaffold, however, mainly taught by example, and the example was most effective when those who suffered death at the hands of the common hangman were clearly deserving of death. The trial, and even more the process of pardon, were to a considerable extent a procedure for selecting the right men and women to be executed.

26. SP 36/59/119.

27. See on this point King, "Decision-Makers and Decision-Making," 44.

How many and who would be sent to the gallows would depend in the end on a wide range of considerations. Not the least of these was the general state of crime at that moment — or what the state of crime was thought to be — and thus how anxious the courts and the government were to enlarge the terror of the law in the interests of deterrence. Judges often justified their original decision not to reprieve a convicted offender because of the need at that time and place to provide an example, to send a message to the county.²⁸ On at least two occasions in the eighteenth century it was made known by the government that royal pardons were going to be difficult to obtain because crime was thought to be at a very high level, and in those periods executions also ran at a very high level.²⁹

Within such broad considerations, men and women were selected to provide the most effective examples. Those actually hanged in the eighteenth century were thus likely to share certain characteristics.³⁰ First of all they had committed one of the “serious” offences. Second, they were likely to be men, not women. Women did not commit such offences in large numbers, and those who did were treated with a great deal more leniency by the courts. That was not a matter of chivalry, but rather that women on the whole did not present the kind of threat to the community, to property, to life, to social order, that men presented — certainly the kinds of men the courts and the government were anxious to make examples of. This is the third characteristic of the hanged: they appeared to the authorities to be dangerous — men settled into a life of crime, “old offenders” — or at least to be vagrants and wanderers who had no fixed settlement. Such people appeared to be free of natural social attachments and controls; they included men who lived anonymously in the larger urban parishes, strangers who had no one to vouch for them, or complete outsiders like Irishmen who could only rarely get the kind of “respectable” character evidence the courts would

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28. See, for example, the report of Justice Eyre to the secretary of state on the case of John Speed, convicted before Eyre for horse theft in 1724 at Somerset. Explaining that he could not evaluate the claims made in the petition for pardon because “the Petitioner call’d no witnesses to his reputation or good behaviour, to shew that he was settled in any industrious course of life, or that he was seduced & drawn in by others to commit the offence,” Eyre went on to justify the decision he made at the trial to leave Speed for execution. “It happened too,” he reports, “that another person was convicted at the same Assizes of the like offence, but the Evidence against him was not altogether so clear as that which was given against the Petitioner; and their being great Complaints of Horse-Stealing, which is a crying grievance in that county, I thought it necessary to make an Example; and that, if one of these offenders was to suffer, the punishment ought to fall upon him who appear’d to be most manifestly Guilty . . .” (SP 35/52/57).
29. Douglas Hay, “Crime, Authority and the Criminal Law: Staffordshire 1750–1800” (Ph.D diss., University of Warwick, 1975), 511–26.
30. On this see Peter Linebaugh, “Tyburn: A Study of Crime and the Labouring Poor in London during the First Half of the Eighteenth Century” (Ph.D diss., University of Warwick, 1975), ch. 8. For rates of pardon for different offences and for male and female offenders see Beattie, *Crime and the Courts in England*, 433–39.

pay attention to and who were treated with harshness and prejudice by the English courts. The only men in a weaker position were those who were *known* to be old offenders, and those whose attempts to get pardons were actually opposed by important men in their communities, an occasional happening.³¹

v

The French jurist Cottu, who visited England in 1820 to investigate the judicial system on behalf of the French government, was struck by what he thought was the indifference of the English courts (compared to the French) to the details of the offence — an indifference to motive and the circumstances surrounding the commission of the crime.³² There is clearly some truth in this. The English courts in the eighteenth century, while not wanting to see the innocent wrongly charged and convicted, seem not to have been as concerned with the abstract issues of guilt and innocence or with the *justice* of the verdict and sentence as they were with the general outcome of a court session and the overall impression it was likely to make. The royal pardon was the crucial instrument in the manipulations and management that produced those desired effects and that characterized the eighteenth century criminal justice system.

In the second half of the eighteenth century and into the nineteenth, the convictions and attitudes that supported that system and the law it enforced came increasingly under attack. Those who argued then against the wide ambit of capital punishment were concerned about its cruelty, its disproportion, and perhaps in particular about the fundamental capriciousness that had long been characteristic of the criminal justice system and that was, in that post-Beccarian age, coming to seem its great weakness rather than strength. By the 1820s, a process of wide-ranging reform was undertaken, in part at least because the old institutions and procedures were being overwhelmed by the numbers of offenders,³³ and a new set of assumptions took root, including perhaps a greater concern for the rights of the individual before the courts. At the same time the political system and the political structure that had sustained the active and personal royal power of pardon were similarly coming under attack. In the reconstructions that followed, the royal pardon ceased to play the central role in the administration of justice that it had for several centuries. That, however, is a different story.

31. A group of twenty-eight corn traders, for example, petitioned the Duke of Newcastle against a free pardon for William Summers, who had been convicted of receiving stolen corn and sentenced to transportation. Summers was represented by the petitioners as an "Old notorious Offender," and his pardon, they argued, "will be greatly detrimental to not only the Corn Trade but other Trades in general by suffering so hardened a Fellow to escape his just Punishment, since it is Evident that he will continue in the same way and the Fear of Punishment will make no impression on him" SP 36/62/277. See also SP 35/42/439, SP 36/63/462, and SP 36/129/6.

32. M. Cottu, *On the Administration of Criminal Justice in England* (English trans., 1822; originally published as *De l'Administration de la Justice Criminelle en Angleterre* [Paris, 1820]).

33. Hay, "Capital Punishment in England, 1750-1832."